No. 12947

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CALIFORNIA VEGETABLE GROWERS, a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

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I.

STATEMENT OF JURISDICTION.

A. Pleadings.

1. COMPLAINT by Appellant against the United States of America for the purchase price of celery sold and delivered to Quartermaster Corps of the United States Army. [Tr. p. 3.]
2. ANSWER of the United States of America setting up rejection for failure to meet specifications. [Tr. p. 7.]

B. Statutory Provisions Upon Which Jurisdiction of United States Courts Are Founded.

1. Title 28, Section 1346(a) (2) U. S. C. A.

C. Facts Upon Which Jurisdiction Is Based.

1. Appellant has its principal place of business within the southern district of California and the celery, the subject of this action, was delivered to Appellee within said district. [Tr. p. 38; 31, 32 and 33.]

II.
STATEMENT OF THE CASE.

A. Statement of Facts.

The facts in this case are not in dispute. The pertinent facts are as follows: The Quartermaster's Corps advertised for bids for celery and Appellant submitted bids for three car loads at $2.30 per crate, which bids were accepted and a purchase order duly issued to Appellant by the contracting officer at the Quartermaster Market Center at Los Angeles for each car. [Tr. pp. 14, 31, 32, 33 and 39.] The celery was packed and loaded on the cars by Appellant in accordance with the specifications in the purchase orders [Tr. pp. 129, 130, 131, 20, 21 and 22] at Lompoc, California, which was the point of origin of shipment. The purchase orders call for delivery F. O. B. Guadalupe, actual loading took place at Lompoc, a nearby town, a point satisfactory to Appellee. The celery was inspected at Lompoc at the time of delivery to the carrier and was found to be in the condition and grade called for by the purchase orders and packed and iced in accordance with the specifications set forth in the purchase orders. [Tr. pp. 129 to 131 and 20, 21 and 22.] After packing inspection and loading, car number P. F. E. 45854 left Lompoc on the 14th of December 1946, and arrived at Seattle, Washington, on the 21st day of December 1946. [Tr. p. 16.] Car number P. F. E. 41017 left Lompoc on the 16th day of December 1946, and arrived at Seattle, Washington, on the 23rd day of December 1946. [Tr. p. 16.] Car number S. F. R. D. 3086 left Lompoc on December 16, 1946, and arrived at Seattle, Washington, on December 23, 1946. [Tr. p. 16.] On December 24, 1946, the celery in car number P. F. E. 41017 was inspected by Appellee at Seattle,

Washington, and was found to have deterioated below the standard ordered. [Tr. pp. 17 and 27.] On December 23, 1946, the celery in car number P. F. E. 45854 was inspected by Appellee at Seattle, Washington, and found to have deteriorated below the standard ordered. [Tr. pp. 18 and 29.] The celery in car number S. F. R. D. 3086 was inspected by Appellee at Seattle, Washington. on December 24, 1946, and found to be below the grade ordered. [Tr. pp. 16, 17 and 25.] Upon the inspections in Seattle, Appellee rejected the celery and refused to take delivery or pay for the same. Appellant thereupon proceeded to sell the celery on the open market to mitigate damages, receiving $591.02 over and above freight charges. [Tr. p. 18.] The total bid price for the three cars of celery was $3,427.00. [Tr. p. 14.] Appellant brought this action for $2,835.98, the difference between the $591.00 received and the contract price. The shipments were made on commercial bills of lading to be converted to Government bills of lading at destination. [Tr. p. 9.]

B. Questions Involved in This Appeal and the Manner in Which They Arise.

1. There is no dispute in respect to the facts in this case and there is but one principal question involved in this appeal. This question is a pure question of Sales Law which may be stated as follows: "Where a seller delivers a perishable commodity to the buyer F. O. B. cars at point or origin of shipment and the buyer in-

spects at destination of shipment, must the inspection at destination relate to the time of delivery at origin or to the time of arrival at destination?" To state the question another way, "where seller delivers to buyer F. O. B. cars at point of origin of shipment, upon whom is the risk of loss during shipment?" From a trial standpoint the question might be stated, "where the seller delivers to the buyer F. O. B. cars at point of origin of shipment and the perishables delivered are in accordance with the contract of purchase, but upon arrival at destination the commodity is found to have deteriorated below the quality ordered, upon whom is the burden of proof in relation to establishing the cause of deterioration?"

In this cause the celery was admittedly up to the standard ordered when delivered to the Government at Lompoc F. O. B. cars. Thereafter, seven to nine days later, it was inspected at Seattle, Washington, and found to have deteriorated slightly below the standard specified in the purchase orders. The period in transit is a blank insofar as the evidence is concerned. Neither party could account for the deterioration and neither party had any information relating to what happened to the celery during the seven to nine day shipment period. All that is known is that four to seven percent rot was present when the celery was inspected at Seattle and no rot was present when the celery was packed and loaded at Lompoc. In the light of this situation the trial court held that Appellant had not complied with the contract and was not entitled to judgment.

III.
SPECIFICATION OF ERRORS.

A. The Trial Court Erred in Determining Under the Admitted Facts That Appellant Did Not Comply With the Contracts Evidenced by the Purchase Orders.

As before stated the celery was admittedly young, fresh and above the standard of U. S. No. 1 when delivered to Appellee F. O. B. cars at Lompoc. The deterioration occurred after delivery and neither party could explain by the evidence why rot developed. The court therefore erred in not rendering judgment for Appellant.

B. The Findings of the Court Are in Some Respects Inadequate.

1. The court failed to find that the purchase orders called for delivery to Appellee F. O. B. origin.

2. The court failed to find that the celery was delivered to Appellee at Lompoc F. O. B. cars in accordance with the terms of the contract.

3. The court failed to find that the rot developed after delivery to Appellee at Lompoc F. O. B. cars.

4. The court failed to find that title passed to Appellee at the time delivery was made F. O. B. cars at Lompoc.

IV.
ARGUMENT.

1. Facts.

There is no dispute or argument in respect to the terms of the contracts evidenced by the purchase orders or the facts relating to performance by Appellant.

The purchase orders [Tr. pp. 31, 32 and 33] call for three carloads of eighty-eight percent U. S. No. 1 celery packed according to specifications. The portions of the purchase orders which control in respect to this appeal read as follows:

> "In accordance with your.....oral quotation..... of 13 December 1946, please furnish the following on the terms specified on both sides of the page and on the attached sheets including delivery F. O. B. origin.
>
> "Methods of presenting invoices or vouchers and of packing, marking and shipping shall be as provided herein except as otherwise directed by the contracting officer. Ship on com'l B/L to be converted to Govt. B/L at destination."
>
> "Inspection points—inspection and acceptance at destination."

The purchase orders perhaps do not call for inspection at point of delivery, however, Appellee did cause an inspection to be made at the place and time of delivery to it, F. O. B. cars at Lompoc by Appellant. The inspection reports are in evidence. [Tr. pp. 20, 21 and 22.] They show the celery to be eighty-eight percent U. S. No. 1 without decay and in accordance with the specifications set forth in the purchase orders.

2. Law Applicable.

a. Where the contract provides for delivery F. O. B. point of shipment, title passes to buyer unless a contrary intention appears.

Southern Pacific Co. v. Hyman Michaels Co., 63 Cal. App. 2d 757, 147 P. 2d 692;

Planters Oil Mill and Gin Co., v. A. K. Burrow Co., 10 F. 2d 312;

Higgins v. California Prune and Apricot Growers, 16 F. 2d 199, *Certiorari* denied 273 U. S. 781, 71 L. Ed. 889, 47 S. Ct. 460;

Lord v. Edwards, 148 Mass. 476, 20 N. E. 161;

Louisville & N. R. Co. v. United States, 267 U. S. 395, 69 L. Ed. 678, 45 S. Ct. 233;

Illinois C. R. Co. v. United States, 265 U. S. 209, 68 L. Ed. 983, 44 S. Ct. 485, 46 *Am. Jur.* 605, Sec. 440, 46 *Am. Jur.* 608, Sec. 442.

b. The reservation of the right to inspect at a point other than the point of delivery F. O. B. carrier does not prevent passage of title.

Louisville & N. R. Co. v. United States, 267 U. S. 395, 69 L. Ed. 678, 45 S. Ct. 233;

Illinois C. R. Co. v. United States, 265 U. S. 209, 68 L. Ed. 983, 44 S. Ct. 485;

Delaware L. & W. R. Co. v. United States, 231 U. S. 263, 58 L. Ed. 269, 34 S. Ct. 65;

Pray v. Tower Lumber Co., 101 Cal. App. 482, 281 Pac. 1036, 46 *Am. Jur.* 610 pp. 443-444;

Williston on Sales, Revised Edition, Vol. II, p. 98, section 280b, p. 29, section 269.

Williston at page 29 of Volume II of his revised work on sales, states the law as follows:

> ". . . The goods may be identified but, nevertheless, subject to the approval of a third person and in that case the property will not pass without such approval; but the fact that the buyer has a right of inspection before being required to accept the goods should not affect the usual presumption applicable to the transfer of the property. To hold otherwise would habitually destroy the effect of these presumptions, for the buyer always has this right of inspection unless the terms of the contract were inconsistent with such a right, or the buyer has waived it."

Again at page 8 Volume III of *Williston On Sales* (revised edition) it is said:

> "The common illustration of this principle is where goods are shipped by a carrier in accordance with an order or contract. As has been seen, the property passes in such a case to the buyer on shipment, if the authority given by the order or contract is observed. It is often said in such cases that delivery to the carrier is a delivery to the buyer. Indeed, it is so provided in the Sales Act, and it may be urged that the buyer should exercise his right of inspection before such delivery to him, and that if he fails to do so, he waives his right; but whether or not the buyer is entitled to inspect the goods at the point of shipment, it is clear that the delivery to the carrier and the transfer of the property thereby to the buyer do not preclude a right of examination when the goods reach their destination (unless the contract expressly provides for inspection on shipment) although it is equally clear that if the goods were shipped in conformity with the contract or order, the risk of loss and other incidents of ownership during the transit

fall upon the buyer; so that if the goods are lost in transit, the right of inspection is lost. The principle applicable to the case of goods shipped by a carrier is also applicable where, for any reason, the property passes in uninspected goods before delivery.

"It is often said without due reflection that when goods are shipped in attempted fulfillment of an order or contract, that if the goods are not of the specified quality, the property passes to the buyer on delivery of the goods to the carrier, but that the buyer, on examining them, may rescind the sale. This, however, seems inaccurate. The seller is authorized to appropriate to the buyer only such goods as the offer or contract indicates."

In *Standard Casing Co. v. California Casing Co.*, 233 N. Y. 413, 135 N. E. 834, the court aptly states the rule as follows:

(The right of inspection) ". . . Whether expressed or implied, does not change the incidence of the risk. Title passes upon shipment, though subject to the right of rescission upon the discovery of defects."

c. The right to inspect at destination reserved by the contract was probably waived by inspection at point of shipment; however, the point is academic for the reason that inspection at destination must relate to condition at time of origin of shipment.

There are several cases directly in point in respect to the time an inspection for condition must relate where shipment is made F. O. B origin with the right reserved to inspect at destination.

Rinelli v. Rubio, (Ind.) 120 N. E. 388.

At page 389 the court says:

"1. The general rule seems to be that, where goods are sold by description and the buyer has not had an opportunity of inspecting the goods, they must not only, in fact, answer the description, but must also be salable or merchantable under that description. (Cases cited.)

"2. The question then arises: At what time and place should the inquiry as to merchantability be directed? Manifestly, under the contract in suit it should be directed to the time and place of delivery to the carrier, and the court should have instructed the jury clearly on this point. Apples are perishable goods. In the sale of perishable property there is no implied warranty that it will continue sound or merchantable for a definite period, or any period after delivery." (Cases cited.)

Whittaker v. Dunlap-Morgan Co. 44 Cal. App. 140, 186 Pac. 181.

In this case the court says:

". . . The agent purchased the hay for delivery 'f. o. b.' McFarland. This term is one that has such a common commercial signification that the courts take notice of its meaning, generally without proof. 'In many mercantile contracts it is stipulated that the vendor shall deliver the goods "f. o. b." *i. e.*, "free on board." The meaning of these words is that the seller is to put the goods on board at his own expense on account of the person for whom they are shipped, and the goods are at the risk of the buyer from the time when they are put on board.' *Benjamin on Sales* (7th Ed.) § 682. 'If, therefore, the contract provides that goods are to be delivered f. o. b. at point of shipment, the presumption that the prop-

erty is to pass then is applicable.' *Williston on Sales,* § 280. Notwithstanding *that title to the hay passed at the time the loading on cars at McFarland was completed, the transaction might still have been subject to rescission by a showing that after inspection at Los Angeles the hay was determined not to have been in a marketable condition at the time of shipment.*" (Emphasis ours.)

Mette & Kanne Distilling Co. v. Lowrey, (Mont.) 101 Pac. 966 at page 968 the court says:

"2. *The evidence on the part of the plaintiff tended to show that the shipment was strictly in compliance with the order. Defendant, in order to rebut this prima facie case, was permitted, over plaintiff's objection, to introduce evidence tending to show:* That the barrels containing the whiskey were received apparently in the same condition as when shipped; that they were put into defendants' cellar and properly stored; that the cellar was kept locked so that no person but the proprietors, King and Lowrey, and their employes, could have access to them; that, after they remained there long enough to allow the whiskey to get into condition for use, they were opened, whereupon it was found that they contained an adulterated liquor of a quality entirely different from Meadeville rye whiskey; and that the adulteration could not have been accomplished except at some place where there were facilities for that purpose. This evidence also tended to show that the barrels had not been tampered with after they reached the cellar. All of it was objected to on the ground that it was immaterial and irrelevant, in that it did not tend in any way to show that the plaintiff had not shipped the quality of whiskey ordered. The objection was properly overruled. The quality of

the whiskey when it was received was evidence of its quality at the time of its shipment; the proof on this point being materially aided by the fact that the barrels had not thereafter been tampered with while in charge of the carrier or after their arrival in Butte, as well as by the additional fact that the contents had not been adulterated as they were found to have been after their receipt in Butte."
(Emphasis ours.)

Skinner v. Jones Griffiths & Sons, (Wash.) 141 Pac. 693;

California Vegetable & Fruit Co., v. Lane, (Mich.) 242 N. W. 792;

Mobile Fruit & Trading Co. v. McGuire, (Minn.) 83 N. W. 833.

d. Any question relating to intent in respect to the time of passage of title to the celery is concluded by the provision of the purchase order requiring the commercial bill of lading to be converted to government bill of lading at destination.

This provision was obviously placed in the order to enable the government to take advantage of the reduced freight rates on land grant railroads. In order for the government to ship at land grant rates, title to the celery had to be in the government; otherwise a fraud on the railroad would have been contemplated, which, of course, was not the case.

Henry H. Cross Co. v. United States, 133 F. 2d 183;

United States v. Jackson, 158 F. 2d 700;

Louisville and N. R. Co., v. United States, 267 U. S. 395, 69 L. Ed. 678.

V.
SUMMARY.

1. The purchase orders provide for delivery F. O. B. origin by their specific terms.

2. The purchase orders, by reason of the government bill of lading provisions, provide that title should pass to the government at the time of delivery F. O. B. cars.

3. The damage or deterioration occurred after delivery to the government, after the celery was in the possession of the government, and after title had passed to the government.

The evidence shows conclusively that delivery was made to the government in accordance with the terms of the contract and that the deterioration took place in a period seven to nine days after possession and title was in the government. No showing was made by the evidence explaining the reason for the deterioration or establishing that Appellant, the seller, was at fault in any way or that it did or failed to do anything that caused the deterioration.

4. The right to inspect and reject at a point other than the delivery point must relate to the time delivery was made to and title passed to the government.

5. The evidence showing by the government's own inspection reports that the celery was of the quality and condition called for by the contract at the time of delivery to the government, it violated the contracts of purchase by refusal to pay for the celery and judgment should have, under the admitted facts, been rendered for Appellant.

VI.

Conclusion.

It is quite apparent that not only the law but the equities are in favor of Appellant in this case. Appellee takes the position that it could reject the shipment long after it had taken possession and title arbitrarily, without inquiry as to what caused the loss and without any showing that Appellant was at fault. In all fairness Appellant should not be held responsible for the negligence of the government or its agent, the carrier, nor should it be held responsible for any casualty occurring after it had passed title and control to the government where it had not assumed such a responsibility and had contracted to deliver at a point of origin of shipment. Had Appellant contracted to deliver at Seattle the price would doubtless have been higher. The effect of the Judgment in this case is to force upon Appellant a risk it did not assume. Such a Judgment is contrary to law and is patently unfair. Appellant therefore urges that the Judgment be reversed and that Judgment be ordered for Appellant.

Respectfully submitted,

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